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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS M. CARROLL, ROBERT J. CARROLL, MICHAEL E. McCHESNEY, EMANUEL J. PANOS, EDWARD J. PRIOLA, CRAIG J. RUCKER, ROBERT T. SCHMIDLIN, BETH TURKOVIC GARFUNKEL, CHRISTINE McCLELLAN, CHRISTOPHER SANDOR and SUSANNE ZIEGLER,

Petitioners,

vs.

DONALD M. BLINKEN, in his capacity as Chairman of the Board of Trustees of the State University of New York, GEORGE L. COLLINS, JR., D. CLINTON DOMINICK, JUDITH LASHER DUKEN, ARNOLD B. GARDNER, GURSTON D. GOLDIN, JOHN L.S. HOLLOMAN, JR., NAN JOHNSON, EVERETTE JOSEPH, JUDITH DAVIDSON MOYERS, EDWARD V. MELE, VICTOR MARRER, ROSEMARY SALOMONE, EDGAR A. SANDMAN, THOMAS VAN ARSDALE, DARWIN R. WALES in their capacities as trustees of the State University of New York, JEROME KOMISAR, in his capacity as Acting Chancellor of the State University of New York, VINCENT O'LEARY, CLIFFORD D. CLARK, ALICE CHANDLER, in his or her capacity as President and chief administrative officer of, respectfully, the State University of New York at Albany, the State University of New York at Binghamton, and the State University of New York at New Paltz, NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF STATE RESPONDENTS IN OPPOSITION

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Question Presented

Does a student activity fee regulation which promotes a university's substantial interest in providing its students extracurricular life, "participatory civics training" and energetic campus debate, which interest would be served less effectively absent the regulation, justify an objecting student's payment of a portion of that fee for the political speech of one of numerous recipients of the fee, chosen on a content-neutral basis, where the money is spent only on activities of the recipient which are germane to the university's educational interests?

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BRIEF OF STATE RESPONDENTS IN OPPOSITION

Respondents, Chairman and the individual Trustees of the State University of New York, its Chancellor and President at Albany (collectively "SUNY"), respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because the circuit court correctly applied the decisions of this Court, the petition does not present a conflict among the courts of appeals and does not raise an important federal question which should be settled by this Court.

Statement of the Case

A. The Student Activity Fee Regulation

It is part of the core purpose of a university to stimulate campus debate and the exchange of ideas (JA. 223)[1], and to enhance through extracurricular activities, the educational, social, cultural and recreational experiences of its students (JA.372-73). It was to further this purpose that the SUNY Board of Trustees adopted a regulation as amended in 1976, 8 N.Y.C.R.R. §302.14 (the "Regulation"), to establish a mechanism through which a broad range of extracurricular activities could be funded (JA.372-73).

The Regulation governs the imposition, collection and allocation of the Student Activity Fee at SUNY, including the Albany campus (JA. 563-66). Implementation of the Student Activity Fee is carried out by the campus president. § 302.14(c)(1) (JA.564).

The Regulation provides that prior to the close of the academic year 1976-77 and every four years thereafter, the student body at each SUNY campus "shall determine by referendum whether student activity programs shall be supported by either voluntary or mandatory fees." § 302.14(a) (JA. 563-64). This student referendum is binding (*Id.*).

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[1] Numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix in the court below. Numbers in parentheses followed by the letter "a" refer to pages in the Appendix to the Petition.

If the students vote for mandatory fees, the representative student organization on each campus submits a proposed budget to the President, prior to registration each semester. The President either approves or disapproves the budget, a particular allocation, or any subsequent change in allocation. § 302.14(c)(1) (JA. 564).

This review is to ensure that the allocations comply with the prescribed criteria of the Regulation, which require that the allocations benefit the campus community and are used for, *inter alia*, "(i) programs of cultural and educational enrichment", or for "(vi) assistance to recognized student organizations, provided that the purpose and activities of the organization are of educational, cultural, recreational or social nature." § 302.14(c)(3) (JA. 566)

Certification of the budget is the authorization needed to collect fees at registration. § 302.14(c)(1) (JA. 564). Failure to pay the fee may result in denial of registration. § 302.14(c)(2) (JA. 564).[2]

The Regulation is content-neutral. It does not authorize the President or his designee to base his or her decision upon the views or positions articulated by any particular student group (JA. 563-66). In fact, the Regulation requires that the representative student association fund student groups consistent with principles of equal opportunity. § 302.14(c)(1) (JA. 564).

B. Proceedings Below

Petitioners[3] commenced this action in the United States District Court for the Southern District of New York against

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[2] Under circumstances not relevant here, the fee may be waived or reduced, *e.g.*, when it might cause undue hardship. §302.14(c)(2) (JA. 565).

[3] Although the trial involved the injunctive claim of only one plaintiff, reference will be made to "petitioners" in the brief because the district court in its decision granted plaintiff's motion to add new plaintiffs.

SUNY and the New York Public Interest Research Group ("NYPIRG"). They sought to enjoin the allocation of a portion of SUNY's mandatory student activity fee to NYPIRG and to recover from NYPIRG that part of the fee paid over to it, because petitioners claimed application of the Regulation to NYPIRG compelled them to support the political positions advocated by NYPIRG, with which they disagreed, in violation of their First Amendment rights to speech and association.[4]

Because the district court had granted respondents' motion to dismiss the injunctive relief claims of all plaintiffs who had graduated from SUNY and to bifurcate the injunctive and damages claims, the trial was limited to Michael McChesney's injunctive claim against SUNY-Albany.

C. The Trial

1. Application Of The Regulation At SUNY-Albany

During the relevant time period, the students at SUNY-Albany voted to have a mandatory student activity fee (JA. 137, 142).[5] The fee at the time was $55.00 per semester and resulted in a student activity fee budget of over one million dollars (JA.463).

The determination and approval of the groups to receive funding is entirely content-neutral (JA. 146, 177). The only requirement for funding is that the group fall within the stated guidelines of the Regulation (JA. 146, 177, 183-85).

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[4] At the outset of the litigation, the court denied petitioners' motion for class certification. 99 F.R.D. 166 (S.D.N.Y. 1983). Consequently, the court dismissed as defendants four of the SUNY college presidents at campuses not attended by a named plaintiff. 575 F. Supp. 772 (S.D.N.Y. 1983).

[5] The relevant time period for the injunctive claim was Fall, 1986, when Michael McChesney became a student at SUNY-Albany, until the trial in October, 1989.

As a result of the application of the Regulation, over 100 diverse groups were funded at SUNY-Albany. For instance, the fee supported the Dance, Theater and New Arts Councils, the Albany State University Black Alliance ("ASUBA"), the Revisionist Zionist Alternative ("RZA"), Fuerza Latina, the Feminist Alliance, the Gay and Lesbian Alliance ("GALA"), the Student Association of the State University ("SASU"), a ski club, a geography club, intramural athletics and many more (JA. 613-62).

The student association funded NYPIRG at the rate of $3.00 per student, per semester. NYPIRG was not unique in this regard. SASU for example was funded on a per capita basis, and received a lump sum payment. And three funded groups, SASU, the United States Student Association ("USSA") and Amnesty International, like NYPIRG, are not based exclusively on campus, with Amnesty having its principal office off campus (JA. 637, 638, 659).

2. NYPIRG And Its Activities

During the relevant time period, President O'Leary approved the student association's budget, including the allocation to NYPIRG.[*] Central to his determination was that NYPIRG is educational and benefits the students at Albany, and thus meets the requirements of the Trustees' Regulation:

> [NYPIRG] provides an opportunity for our students to select issues, to do research on those issues, to articulate the bases of those issues, and to try to persuade people as to the worthiness of those issues.

(JA. 176).

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[*] Every two years, but prior to a final budget, the student association holds a referendum to make sure that the students want to fund NYPIRG. This referendum is not provided for in the Regulation and is advisory only (JA. 143, 144). In addition to NYPIRG, SASU and USSA are also subject to an advisory referendum on their funding (JA. 469).

The evidence showed that the Albany chapter of NYPIRG organized speeches, sponsored debates and public forums on many public issues. For example, the Chapter sponsored a forum on recycling, a professors' forum on the arms race, a symposium on women's health care, and a debate between representatives of presidential campaigns. Hundreds of students participated in these events (JA. 520-21, 317-18, 1295-1321, 1324-37).

NYPIRG also provided students with the opportunity to participate in civic training through, for example, its lobbying activities and legislative internships (JA. 180, 446-53). A NYPIRG legislative internship involves regular workshops, an intensive two-week training program, a legislative conference, actual lobbying in the New York State Legislature, research and writing. Legislative interns also participate in the "lobby game" a simulated Legislature, where the students play different constituent groups and practice media and advocacy skills (JA. 1347-74).

President O'Leary testified that students participating in NYPIRG are the ones who adopt the side they will take on a given issue. Their choice of "side" is their own, not predetermined by someone else (JA. 180). By learning about the political process, students enjoy "an opportunity of participating in the most fundamental aspects of a democratic society" (21a).

D. The Decisions Below

On July 30, 1991, the district court denied petitioners' claim for injunctive relief and dismissed the complaint. The court found that SUNY-Albany, through its student activity fee policy, funds an array of diverse groups, thus providing a forum for public discussion and debate. The university's creation of such a forum, which is content-neutral, is itself an interest protected by the First Amendment. *Carroll v. Blinken*, 768 F. Supp. 1030 (S.D.N.Y. 1991) (JA. 128).

Having found that SUNY has a protected interest in providing the students with a content-neutral public forum, the court balanced this interest against petitioners' First Amendment

claim. The court determined that SUNY-Albany's funding of NYPIRG through the allocation to it of $3.00 from petitioners' mandatory student activity fee, did not impermissibly infringe upon petitioners' First Amendment rights because there was no close association between petitioners and the political speech with which they disagreed (JA. 129). Since the petitioners' fee supported an array of student groups, the court held that the connection between petitioners and the view of any group or organization funded by the fee was attenuated. Thus the court concluded that no close association existed between petitioners and NYPIRG and petitioners' First Amendment rights were not violated (JA. 132).

On appeal, the court preliminarily determined that compelled payment of a part of the mandatory student activity fee to NYPIRG, in order to continue as a student at SUNY-Albany, violated petitioners' rights to be free from compelled speech and association, because the automatic membership[7] and the compelled payment of funds "hinges not on the ideological affinity between member and group, contributor and recipient, but rather on the compulsion inherent in conditioning registration, and hence matriculation and graduation on payment of the fee." *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) (14a).

The court, however, unanimously upheld the Regulation as applied to NYPIRG because it said that these intrusions were justified. A regulation which is content-neutral will withstand scrutiny if it promotes a substantial governmental interest which would be achieved less effectively absent the regulation (18a).

The court found that the student activity fee is content-neutral. It is not intended to restrict free speech; to the contrary, "it seeks to expand campus speech by facilitating the activities of a wide variety of speakers" (18a). The court also found the

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[7] NYPIRG's By-Laws provided *inter alia* that any fee paying student is automatically a member of NYPIRG (27a). On April 11, 1992, NYPIRG amended its By-Laws to delete the provision providing for automatic membership, and therefore, it is not an issue for review.

funding provision to be content-neutral because it does not grant or withhold funds based on the content of the recipients' speech (*Id.*).

The court found that the Regulation also promotes substantial interests of the university, specifically (1) the general promotion of extracurricular activities, (2) the facilitation of skills and civic duty and (3) the stimulation of robust campus debate on a variety of public issues (19a).[8] The court held that these interests together are substantial enough to justify the infringement that occurs when Albany transfers a portion of the activity fee to NYPIRG (23a).

The court also held that the use of a mandatory fee as a means of encouraging campus debate is the practice of universities and colleges throughout the country, and that these interests would be served less effectively absent the activity fee regulation. The court recognized that the ability of NYPIRG and other groups to function effectively requires that it have adequate resources upon which it can depend for stability. Moreover, the court stated, the mandatory fee shows the University is committed to the goals of enriching campus life and promoting debate (24a).

The court thus concluded that a state university may constitutionally allocate a student's activity fees to a group with whose speech some students disagree as long as the organization spends the equivalent of the students' contributions for the benefit of the campus, and does not define its membership to include all fee paying students (28a).

The court affirmed the district court's order upholding application of the Regulation to NYPIRG, reversed in part, and remanded the case to the district court with instructions to fashion as unintrusively as possible, procedures to ensure that NYPIRG spend as much at SUNY-Albany as it receives from Albany students' fees and to eliminate NYPIRG's automatic membership scheme (28a).[9]

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[8] The court noted that in scrutinizing the University's interests in funding NYPIRG with student activity fees, it accorded "wide latitude to universities to define and carry out their educational mission" (18a).

[9] No judgment as to this procedure has yet been entered by the district court.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals' Decision Is Consistent With Decisions Of This Court

The court of appeals' decision that application of the Student Activity Fee Regulation to NYPIRG satisfies the First Amendment is in accord with decisions of this Court. Application of a content-neutral regulation which burdens speech satisfies the First Amendment if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989).

There can be no serious dispute that the Regulation is content-neutral. On its face it does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not authorize university officials to administer the Regulation on the basis of such constitutionally impermissible criteria. The only requirement for funding is that the group fall within the facially neutral guidelines of the Regulation. Indeed as the court below found, the Regulation seeks to expand, rather than restrict speech (18a).

SUNY's interest in application of its content-neutral Regulation to NYPIRG is substantial. It is part of the educational mission of a university to create a forum to stimulate vigorous debate and discussion of ideas. To further this purpose, the SUNY Board of Trustees adopted the Regulation to establish a mechanism through which a broad range of extracurricular activities could be funded. As former Chancellor of SUNY, Clifton Wharton testified:

> The basic philosophy of an educational experience in any institution ... is to provide for a student as wide a range of opportunities and exposures which will allow for the development of the potentials of an entire individual. In many cases [a student's goals of] self-fulfillment, self-development and self-improvement ... are only partially met through

> formal classroom education. Therefore, on all campuses I am familiar with, you have a wide range of student activities that are available on campus.

(JA. 372-73).

The court of appeals held that SUNY created such a forum through its mandatory student activity fee and thus had a substantial interest in its Regulation. First, and perhaps most important is its interest in stimulating uninhibited and vigorous discussion on matters of campus and public concern. This interest is hardly unique to SUNY-Albany, but is a universal interest of universities which are "peculiarly the marketplace of ideas". *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967). Second, is SUNY's interest in the general promotion of extracurricular activities. The funding of a multitude of diverse groups including the $3.00 allocation to NYPIRG is consistent with the philosophy that education of students extends beyond the classroom and is consistent with the university's desire to enrich the overall extracurricular lives of the students.[10] Third, SUNY has an interest in the facilitation of educational skills and civic duty through hands-on involvement in the political process. As the court of appeals recognized, these interests together are substantial. In holding that SUNY's interests in its Regulation as applied to NYPIRG are substantial, the court of appeals simply applied well-established principles. *See Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1981) (Stevens, J. concurring) (university "atmosphere" includes extracurricular activities, "critical aspect[s] of campus life"); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. at 603 (The Nation's future depends upon leaders trained through wide exposure to the robust exchange of ideas); *Kania v. Fordham*, 702 F.2d 475, 480

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[10] Petitioners' attempt to distinguish between use of tuition to subsidize education in the classroom and use of mandatory fees for extracurricular "education" is unsupportable. It is a distinction without a difference and points up only a difference in educational philosophy, a philosophy for which SUNY is entitled to deference. Moreover, if petitioners' argument were to prevail it would mean that *no* extracurricular activities would be funded through a student activity fee.

(4th Cir. 1983); *Arrington v. Taylor*, 380 F. Supp. 1348, 1363 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); *Veed v. Schwartzkopf*, 353 F. Supp. 149, 153 (D. Neb.), *aff'd mem.*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

Petitioners argue, however, that the Second Circuit's decision is erroneous in light of this Court's decisions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and its progeny (hereinafter "*Abood*"), because it failed to identify a "compelling" state interest to justify the infringement. Petitioners misconstrue the standard set forth in those cases. *Abood* does not require a showing of a compelling state interest. In fact, each case seems to use different terminology. For example, *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 233 (1956), talks about a "legitimate" interest in labor peace, whereas *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 456 (1984), *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990), and *Lehnert v. Ferris Faculty Assoc.*, 111 S. Ct. 1950, 1960 (1991) hold that the activities must be justified by a "governmental interest" a "state interest" or a "legitimate governmental interest" respectively. None of these cases refers to a compelling state interest.[11]

In any event, SUNY's interest is compelling. The very core purpose of the First Amendment is to foster the robust and unfettered exchange of ideas. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (the first amendment expresses "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open"); *Roth v. United States*, 354 U.S. 476, 484 (1957); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Here, SUNY has adopted a Regulation which creates an equal-access forum to stimulate robust and unfettered debate through the funding of over 100 diverse groups. If *Abood* requires a compelling interest, and

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[11] *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 303 n.11 (1986), a union case, cites to non-union cases which applied a compelling interest standard. However, as with the other cases cited above, *Chicago Teachers* refers only to the "government interest" in labor peace. 475 U.S. at 302.

labor peace is the interest there, the creation of a content-neutral equal-access forum, which itself is a protected interest, is an equally if not more compelling interest which outweighs petitioners' rights to be free of compelled speech. *See Burson v. Freeman*, 60 U.S.L.W. 4393, 4399 (U.S. May 26, 1992) (No. 90-1056) (where fundamental rights conflict, restriction on speech is on the constitutional side of the line).

The court of appeals also found that SUNY's substantial interests would "be achieved less effectively absent the regulation". *United States v. Albertini*, 472 U.S. at 689. Petitioners contend, however, that SUNY could meet its goals without mandatory funding through the many non-student fee funded organizations which provide similar activities, and thus the funding scheme is not a "narrowly tailored" intrusion. This argument attempts to create the fiction that the funding is thus voluntarily given, when in fact, it would require the University to use student moneys from tuition, wholly or in part, to support the arrangement. This contention also ignores the fact that a consequence of tailoring the forum to each student's preference would undermine the system and jeopardize the university's ability to maintain an equal-access educational forum. As the court of appeals recognized, the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can obtain in support of their activities. The fee scheme provides stability and predictability so that established groups can estimate with some accuracy their annual funding. Moreover, an alternate funding scheme "would seem less likely to commit the university community to the goals of enriching campus life and promoting debate. Rather, funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view" (24a).

Although the court of appeals applied the correct "less effective" standard, it was mindful of the need to ensure that even incidental burdens on speech be "narrowly tailored", and therefore, it went a step further and held that funding of

NYPIRG must be limited to activities germane to SUNY's substantial educational interests.[12]

Petitioners misinterpret the decision below when they say that the First Amendment infringement is not cured by limiting the use of fees to NYPIRG's activities which are germane, *i.e.*, for the benefit of the students at Albany. To the extent the court of appeals put limits on NYPIRG's use of fees, it was not because it believed SUNY did not have a substantial interest justifying the infringement, but because it found those excluded activities were not germane to SUNY's substantial educational interests in its Regulation and in funding NYPIRG. By excluding those activities not germane to SUNY's interests, the court of appeals merely applied the teaching of *Abood* which requires that funded activities be germane to the interest to justify a First Amendment infringement.[13]

As both the district court and court of appeals found, those activities of NYPIRG which benefit the students at Albany are germane to the substantial interest SUNY has in funding NYPIRG as part of the forum. NYPIRG teaches concrete skills - research, speaking, writing, and advocacy. Participating students in each area learn about their chosen project, prepare reports, memoranda and press releases, practice public survey techniques, involve themselves in community service efforts, obtain experience in public speaking, sponsor debates and communicate with their legislative representatives. NYPIRG also instills in students a sense of civic activism and responsibility.

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[12] Petitioners' contention concerning the remedy is premature. The court of appeals remanded to the district court to fashion as unintrusively as possible a mechanism to ensure only activities germane to SUNY's interests were funded by the Student Activity Fee. This mechanism has not yet been determined and thus there is no issue for review by this Court.

[13] Petitioners suggest that this case "presents an opportunity for the Court" to apply the teachings of *Abood* "in the important realm of education" (Pet. Br. at 15). However, the court of appeals easily applied the germaneness test of *Abood* to SUNY in this case. Thus, this is not a novel question meriting review by this Court.

Thus the court of appeals concluded:

> A university where NYPIRG petitions against nuclear power, where environmental groups advocate greater recycling, where opponents of South Africa debate opponents of divestment, and partisans of a dozen other causes press their cases is a university fulfilling its traditional mission in a free society. Were it otherwise, college would be a very quiet, intellectually diminished and ultimately irrelevant place.

(22a). SUNY's determination that including NYPIRG as part of the forum serves the educational purpose of the forum is entitled to deference. This court has consistently held that universities should be accorded wide latitude to define and carry out their own educational missions. *See Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

2. The Court of Appeals' Decision Does Not Conflict With The Third Circuit Decision In *Galda v. Rutgers*

Although the Third Circuit held unconstitutional the payment of a mandatory fee to NJPIRG at Rutgers in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986), there is no conflict in the decisions because *Galda* is factually distinguishable. At Rutgers, the students paid a separate and distinct student activity fee to NJPIRG, because it was an organization independent of the university and thus ineligible to receive money from the general student activities fee. The NJPIRG fee was even a separate line item on the student's tuition bill. Unlike at SUNY-Albany, the students paid a fee to only one group - NJPIRG - and not to fund a forum. The Third Circuit noted there is a distinction between PIRG and student organizations funded through the general fee. The general fee is used to subsidize a variety of student groups and therefore a "forum" for a diverse range of opinion, whereas PIRG

itself is not a forum for the expression of different views. 772 F.2d at 1064. Here the fee is used to fund an equal-access forum of over 100 diverse groups including NYPIRG. Thus, the very basis for the Second Circuit's decision was missing in *Galda*. Indeed the Third Circuit recognized the distinction between the cases, because it expressly left open the question raised here, "whether an organization with PIRG's philosophic outlook may be funded through the general activities fee as are other campus organizations representing diverse views." 772 F.2d at 1064. Accordingly, there is no conflict which requires resolution by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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